APPENDIX

STATUTES

Revenue Act of 1918, 40 Stat. 1105:

SEC. 600. (a) That there shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or *imported into the United States,* * * * a tax of $2.20 * * * on each proof gallon, * * * to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law. [Italics ours.]

Revenue Act of 1926, 44 Stat. 104:

SEC. 900. Subdivision (a) of section 600 of the Revenue Act of 1918, as amended, is amended to read as follows:

"SEC. 600. (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or *imported into the United States,* in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:

* * * * *

"(3) On and after January 1, 1928, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

* * * * *

"(5) The internal revenue tax imposed by this subdivision upon distilled spirits heretofore or hereafter imported into the United States shall, under regulations prescribed by the Commissioner, with the approval of the Secretary, be collected and deposited in the same manner as other internal revenue taxes, except that such collection and depositing shall be by the collector of customs instead of by the collector of internal revenue. Such tax shall be in addition to any customs duty imposed under the Tariff Act of 1922 or any subsequent Act. [Italics ours.]

Liquor Taxing Act of 1934, 48 Stat. 313:

SEC. 2. Paragraphs (3) and (4) of subdivision (a) of section 600 of the Revenue Act of 1918, as amended (relating to the tax on distilled spirits generally and the tax on distilled spirits diverted for beverage purposes) [U. S. C., Sup. VI, title 26, sec. 1150 (a) (1) and (2)], are amended to read as follows:

"(3) On and after January 1, 1928, and until the effective date of Title I of the Liquor Taxing Act of 1934, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon; and

"(4) On and after the effective date of Title I of the Liquor Taxing Act of 1934, $2.00 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon."

Revenue Act of 1938, 52 Stat. 572:

SEC 710. *Tax on Distilled Spirits.*

(a) Section 600 (a) (4) of the Revenue Act of 1918, as amended, is amended to read as follows:

"(4) On and after January 12, 1934, and until July 1, 1938, $2.00, and on and after July 1, 1938, $2.25, on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon."

(b) Section 600 (c) of such Act, as amended, is amended by striking out "$2.00 per wine gallon" and inserting in lieu thereof "$2.25 per wine gallon."

(c) Section 4 of the Liquor Taxing Act of 1934 is amended by striking out "$2.00" and inserting in lieu thereof "$2.25."

(d) The amendments made by this section shall not apply to brandy and the rates of tax applicable to such brandy shall be the rates applicable without regard to such amendments.

TRADE AGREEMENT—CUBA

August 24, 1934—T. D. 47232 (49 Stat. 3559).

ARTICLE VIII

All articles the growth, produce, or manufacture of the United States of America or the Republic of Cuba, shall, after importation into the territory of the other country, be exempt from national or federal internal taxes, fees, charges or exactions, other or higher than those payable on like articles of national or any other foreign origin.

* * * and all articles enumerated and described in Schedule II annexed to this Agreement,

with respect to which a rate of duty is specified in Column 2 of the said Schedule, shall be exempt from all taxes, fees, charges or exactions in excess of those imposed or required to be imposed by laws of the United States of America in effect on the day on which this Agreement comes into force.

Supplementary Trade Agreement with Cuba

(55 Stat. 1449)

Effective January 5, 1942

ARTICLE IV * * * 3. The last paragraph of Article VIII of the Agreement of August 24, 1934, as amended, is amended to read as follows:

> The provisions of this Agreement shall not prevent the Government of either country from imposing at any time on the importation of any article a charge equivalent to an internal tax imposed in respect of a like domestic article or in respect of a commodity from which the imported article has been manufactured or produced in whole or in part.

United States Court of Customs and Patent Appeals, October Term, 1942

Customs Appeal No. 4418

UNITED STATES *v.* RATHJEN BROTHERS

(c. a. d. 250)

JACKSON, *Judge,* delivered the opinion of the court:

This is an appeal by the United States from a judgment of the United States Customs Court, Third Division, sustaining a protest of appellee against the assessment of an internal revenue tax of $2.25 per proof gallon under section 600 (a) of the Revenue Act of 1918 (40 Stat. 1057) as amended by section 710 of the Revenue Act of 1938 (52 Stat. 447), on 55 cases of rum in bottles of 1 gallon or less imported at the port of San Francisco from Cuba and entered for warehouse on May 11, 1938. The imported merchandise was assessed with duty at the rate of $2 per proof gallon under the provisions of paragraph 802 of the Tariff Act of 1930 as modified by the trade agreements with Cuba dated August 24, 1934, T. D. 47232, and with Haiti, dated March 28, 1935, T. D. 47667. That assessment was not protested.

The involved merchandise was withdrawn from warehouse on the sixth and fourteenth days of July 1938.

Appellee contended that the involved merchandise was properly assessable with an internal revenue tax of $2 per proof gallon, which was the rate in effect at the time the Cuban Trade Agreement signed August 24, 1934, went into effect, September 3, 1934.

The issue was whether the internal revenue tax as assessed by the collector under said revenue act, which became effective on July 1, 1938, was lawful in view of the Cuban Trade Agreement.

In its decision the trial court agreed with the contention of appellee and rendered judgment accordingly.

The issue for determination here is whether the increased internal revenue tax as provided for in

said section of the revenue act was legally assessable on the involved merchandise.

Section 600 (a) of the Revenue Act of 1918 (40 Stat. 1057, 1105) as far as here pertinent reads as follows:

> Sec. 600. (a) That there shall be levied and collected *on all distilled spirits* now in bond or that have been or that may be hereafter produced in or *imported into the United States,* * * * a tax of $2.20 * * * on each proof gallon, * * * to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law. [Italics ours.]

The Revenue Act of 1926 (44 Stat. 9), in paragraph 900, amended section 600 (a) of the Revenue Act of 1918 insofar as pertinent here, by changing the tax of $2.20 per proof gallon to $1.10.

The Liquor Taxing Act of 1934 (48 Stat. 313) in section 2 (4) thereof, as far as pertinent here, amended the said section of the Revenue Act of 1918 amended as aforesaid, by increasing the tax to $2 on each proof gallon on and after the effective date of title I of the Liquor Taxing Act of 1934, January 12, 1934.

Section 710 of the Revenue Act of 1938 (52 Stat. 447, 572), effective July 1, 1938, as far as pertinent here, in subdivision (a) (4) thereof amended the Revenue Act of 1918 as amended by increasing the tax from $2 to $2.25 per proof gallon.

It is clear that on July 6 and July 14, 1938, the dates upon which the involved merchandise was withdrawn from warehouse, the revenue laws provided that *all distilled spirits* produced in or im-

ported into the United States when withdrawn from warehouse were subject to a tax of $2.25 per proof gallon.

Article VIII of the Cuban Trade Agreement of August 24, 1934, T. D. 47232, as far as pertinent here, reads as follows:

> All articles the growth, produce, or manufacture of the United States of America or the Republic of Cuba, shall, after importation into the territory of the other country, be exempt from national or federal internal taxes, fees, charges, or exactions, other or higher than those payable on like articles of national or any other foreign origin.
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> * * * * *
>
> * * * and all articles enumerated and described in Schedule II annexed to this Agreement, with respect to which a rate of duty is specified in Column 2 of the said Schedule, shall be exempt from all taxes, fees, charges, or exactions, in excess of those imposed or required to be imposed by laws of the United States of America in effect on the day on which this Agreement comes into force.

Schedule II provides that rum, in bottles containing each 1 gallon or less, shall be subject to a net tax of $2 per proof gallon.

Appellant contends here that the tax provided for in the Revenue Act of 1938 clearly conflicts and cannot be harmonized with the quoted provisions of the Cuban Trade Agreement of 1934 and therefore effect cannot be given to both, and the act being later in date must prevail.

Appellant argues that the Congress was presumed to have enacted the said revenue act with

knowledge of the existence of the said trade agreement and that the duty is "admittedly applicable to domestic rum and all other distilled spirits whether imported or domestic." Appellant in its brief contends that if the Congress had intended to exclude from the revenue act merchandise such as involved here, imported from Cuba, "it would have by clear language *excepted* Cuba from the provisions of a statute that was so general in its application." The appellant further contends that article III of the supplementary trade agreement with Cuba dated December 18, 1939, T. D. 50050, amending article VIII of the 1934 agreement, indicates the intent of the parties to the former agreement and may be taken as declaratory of the meaning of it.

Appellee contends that the statute and agreement must be construed, if possible, so as to give effect to both, citing the case of *Whitney* v. *Robertson,* 124 U. S. 190, 194; that the statute applies to all distilled spirits except rum packed in bottles containing 1 gallon or less imported from Cuba or certain other countries; that there is no indication that the Congress intended to increase the internal revenue tax on the involved merchandise and that no such intention should be found unless clearly expressed or implied, citing the case of *United States* v. *Lee Yen Tai,* 185 U. S. 213, 222; that since the statute does not specifically relate to rum packed in bottles containing 1 gallon or less it can be harmonized by applying it to all other distilled spirits, citing the case of *Ropes* v. *Clinch,* 8 Blatchf. 304, Fed. Cases 12,041; that the Congress is presumed to have enacted the statute with knowledge of the exist-

ence of the agreement and therefore an intention to supersede the agreement should be expressly indicated or the language of the statute should be so clear as not to permit of any other construction, citing the case of *John T. Bill Co., Inc., et al.* v. *United States*, 27 C. C. P. A. (Customs) 26, C. A. D. 57, and that the said supplementary trade agreement with Cuba represents a change in policy and is not retroactive.

It is clear as heretofore mentioned that at the time of importation, May 11, 1938, the internal revenue tax attaching to the merchandise was $2 per gallon. It is also clear that at the time the involved merchandise was withdrawn from warehouse the internal revenue tax covering *all distilled spirits* was $2.25 per gallon.

The parties are not in disagreement as to the law, and the principles of law involved in the cases cited by both are not questioned under the facts appearing therein. The issue upon which the parties split in their conclusions is whether or not the said revenue act expressly or by plain implication is so irreconcilably in conflict with the Cuban Trade Agreement of 1934 that being later in date its provisions should govern with respect to the taxing of the involved merchandise.

It is further agreed by the parties that the rule of law applicable to the provisions of a treaty being superseded by a subsequent act of Congress also applies with respect to other kinds of international agreements, such as the Cuban Trade Agreement.

The trial court, in its opinon, held that the Congress when enacting the involved revenue act was presumed to have had knowledge of the

terms of the Cuban Trade Agreement. Both parties agree with that holding and so does this court. With that knowledge, the Congress, in enacting section 710 of the Revenue Act of 1938, imposed a tax of $2.25 per proof gallon "on *all distilled spirits* now in bond or that have been or that may hereafter be produced in or *imported into the United States.*" When the Congress enacted the statute providing that *all distilled spirits imported into the United States* should be subject to an internal revenue tax of $2.25 per proof gallon it certainly must have intended to include imported rum regardless of the size of the containers and regardless of the country from which exported. If we were to hold that the involved merchandise is excepted from the said statute by reason of the quoted provision of the Cuban Trade Agreement of 1934, we would read an exception into the statute, thereby nullifying that portion of the act levying an internal revenue tax on *all distilled spirits imported into the United States.*

It appears to us from the wording of the statute and article VIII of the Cuban Trade Agreement of 1934 that with respect to the issue here the two are absolutely irreconcilable and that therefore the subsequent legislation supersedes by clear implication the quoted portion of that agreement. *Rainey* v. *United States,* 232 U. S. 310, 316; *Whitney* v. *Robertson, supra,* at page 194; *Hijo* v. *United States,* 194 U. S. 315, 324.

We are fortified in our conclusion that the Congress intended by the provisions of the said revenue act to include the involved merchandise as taxable for internal revenue purposes as here-

inbefore set out by the manner in which it worded section 704 of the same act in providing for a tax on lumber, as follows:

> (b) Each sentence of the amendment made by subsection (a) shall become effective (1) on the sixtieth day after the date of the enactment of this Act *unless in conflict with any international obligation of the United States* or (2) if so in conflict, then on the termination of such obligation otherwise than in connection with the undertaking by the United States of a new obligation which continues such conflict. [Italics ours.]

From the above-quoted language it is plain to us that the Congress in enacting the said revenue act had clearly in mind the international obligations of the United States such as the one here involved, and if it had intended that merchandise from Cuba such as in the instant case was to be excepted from the scope of that act it would have so stated as it did with respect to the tax on lumber.

In view of our conclusion it is not necessary to discuss the trade agreement with Haiti of March 28, 1935, T. D. 47667, the supplementary trade agreement with Cuba of December 18, 1939, T. D. 50050, or the cases cited by appellee.

For the reasons herein set out the judgment of the United States Customs Court is *reversed.*

United States Customs Court, Third Division

RATHJEN BROS. *v.* UNITED STATES

(Decided July 1, 1942)

EKWALL, *Judge:* A quantity of rum from Cuba was imported into the United States in bottles of

one gallon or less, and entered for warehouse on May 11, 1938. Certain of the merchandise was withdrawn from warehouse at various times but the only withdrawals with which we are here concerned are those of July 6 and July 14, 1938, consisting of 40 cases and 15 cases respectively. Upon such withdrawals the collector of customs assessed duty under the Tariff Act of 1930 as modified by the trade agreement between the United States and the Republic of Cuba of August 24, 1934 (49 Stat. 3559). With that assessment we are not here concerned, for the only issue raised by the pleadings is the legality of the assessment of an additional tax of $2.25 per proof gallon under the provisions of section 600 (a) of the Revenue Act of 1918 (40 Stat. 1105), as amended by section 710 of the Revenue Act of 1938 (52 Stat. 572). Plaintiffs contend that the amount of the additional tax properly assessable under the revenue act is only $2 per proof gallon, the rate in effect at the time of the signature of the Cuban Trade Agreement, August 24, 1934 (Liquor Taxing Act of 1934, 48 Stat. 313). This claim is made by reason of the provision in article VIII of the said Cuban Trade Agreement to the effect that certain commodities (including distilled spirits) therein described shall be exempt from all taxes, fees, charges, or exactions in excess of those in effect on the day of the signing of the agreement.

The question for determination, therefore, is whether the assessment of the $2.25 rate under section 710 of the Revenue Act of 1938, which became effective as to merchandise tax paid on and after July 1, 1938, was warranted by law insofar

as it was collected upon the rum withdrawn from warehouse on July 6 and July 14, 1938.

Article VIII of the Cuban Trade Agreement, insofar as applicable, reads as follows:

> * * * and all articles enumerated and described in Schedule II annexed to this Agreement, with respect to which a rate of duty is specified in Column 2 of the said Schedule, shall be exempt from all taxes, fees, charges or exactions, in excess of those imposed or required to be imposed by laws of the United States of America in effect on the day on which this Agreement comes into force.

Section 600 (a) of the Revenue Act of 1918, *supra,* levied a tax of $2.20 per proof gallon on distilled spirits (which term includes rum). This rate was reduced by the Liquor Taxing Act of 1934, *supra,* effective January 11, 1934, and later the Revenue Act of 1939, *supra,* further amended the acts of 1918 and 1934 by increasing the tax to $2.25 per proof gallon effective July 1, 1938.

In the brief filed on behalf of the plaintiffs certain provisions of the Haitian Trade Agreement (T. D. 47667) are quoted and apparently relied on in addition to the provisions of the trade agreement with Cuba. However, the rum involved was a product of Cuba and there is nothing to indicate the applicability of the Haitian agreement to the tax here assessed under the internal revenue act, nor has any reason been given for considering that agreement.

It is the contention of the plaintiffs that, if possible, legislation enacted subsequent to the effective date of the trade agreement must be interpreted in harmony with the plain purpose of the treaty.

This is in line with the well-known rule that a treaty and an act of Congress, both being the law of the land, must be considered together and, if possible, effect given to both. *United States* v. *Powers,* 305 U. S. 527; *United States* v. *Domestic Fuel Corp.,* 21 C. C. P. A. (Customs) 600, T. D. 47010; *Bill, etc.* v. *United States,* 27 C. C. P. A. (Customs) 26, C. A. D. 57. Plaintiffs further contend that the Revenue Act of 1938, which, so far as pertinent here, changed the rate of the tax on distilled spirits from $2 to $2.25, bears no evidence of an intention to abrogate the trade agreement.

The Government contends that section 710 of the Revenue Act of 1938, being a later enactment than the Cuban Trade Agreement of 1934, should govern the assessment here involved. This contention is based upon the well-known rule that a statute later in date supersedes the conflicting provisions of an earlier treaty. *Taylor* v. *Morton,* 2 Curtis, 454; *Whitney* v. *Robertson,* 124 U. S. 190; *Head Money Cases,* 112 U. S. 580; *Cherokee Tobacco case,* 11 Wall. 616; *Ropes* v. *Clinch,* 8 Blatchf. 304; *Rainey* v. *United States,* 232 U. S. 310; *United States* v. *Lee Yen Tai,* 185 U. S. 213, 221.

Without deciding whether the trade agreement here involved is a treaty, it is the opinion of the court that being an international agreement entered into by authority of an act of Congress, it would be subject to the same rule in the event that its terms conflict with a later act of Congress.

Congress is presumed to have enacted the revenue act here in question with knowledge of the terms of the Cuban Trade Agreement. Had it

been the intention of the lawmaking body that the products of Cuba should not be subject to the tax imposed by the revenue act, such intention might very well have been expressed in the latter act by suitable wording. This was done in the enactment of section 601 (a) of the Revenue Act of 1932, which levied certain taxes, subject, however, to the proviso "unless treaty provisions of the United States otherwise provide."

It is interesting to note that in the supplementary trade agreement with Cuba (T. D. 50050), which became effective December 23, 1939, article VIII of the agreement of August 24, 1934, was amended insofar as pertinent to the issue herein, to read as follows: [We quote the third and fifth paragraphs of article III thereof]

> Articles the growth, produce or manufacture of the Republic of Cuba enumerated and described in Schedule II annexed to this Agreement shall, on their importation into the United States of America, be exempt from all duties other than ordinary customs duties and all taxes, fees, charges or exactions, imposed on or in connection with importation, in excess of those imposed on September 3, 1934, or required to be imposed thereafter by laws of the United States of America in force on September 3, 1934.
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> *　　*　　*　　*　　*
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> The provisions of Article I and Article III of this Agreement and of the third paragraph of this Article shall not prevent the Government of the United States of America from imposing at any time on the importation of any article a charge equivalent to an internal tax imposed in respect

> of a like domestic article or in respect of a commodity from which the imported article has been manufactured or produced in whole or in part.

In a further supplementary trade agreement with Cuba (T. D. 50541) the last paragraph above quoted was further amended as follows:

> The provisions of this Agreement shall not prevent the Government of either country from imposing at any time on the importation of any article a charge equivalent to an internal tax imposed in respect of a like domestic article or in respect of a commodity from which the imported article has been manufactured or produced in whole or in part.

The above-quoted excerpts are enlightening as indicative of the intention of the parties to the trade agreement and also of their understanding of the terms of such agreement. Apparently both parties recognized that under the terms of article VIII of the original trade agreement with Cuba the exclusive rates therein provided would not be subject to laws which might subsequently be enacted, which later laws might be in conflict with the terms of the agreement. Apparently, also, in these later agreements it was considered wise by both parties to provide for the imposition of a rate or charge which would be compensatory for increased internal taxes imposed on like domestic goods. As evidence of this we quote from a press release entitled "The Analysis of General Provisions and Reciprocal Benefits in the Supplementary Trade Agreement with Cuba," issued by the Department of State on December 23, 1941, as follows:

Article IV amends Article VIII of the existing agreement, relating to internal and compensating taxes on imports. Recognizing the reasonableness of compensatory charges on imports when like domestic products are subjected to new or increased internal taxes imposed for bona fide revenue purposes, the amended Article provides that each country may apply to scheduled products imported from the other, equivalent to internal taxes imposed on like domestic products. Such compensatory charges may not be greater than those imposed on like articles imported from third countries.

For the reasons above set forth we find that the claim of the plaintiffs herein is well founded. At the time the trade agreement with Cuba came into force, viz, August 24, 1934, rum was taxable with an internal revenue tax at the rate of $2 per proof gallon under the terms of the Liquor Taxing Act of 1934, *supra*. The increased rate on distilled spirits (which term includes rum) fixed by the Revenue Act of 1938, viz, $2.25 as of July 1, 1938, should not be held to apply to rum imported from and the product of Cuba which by the terms of a trade agreement with that country, was exempt from taxes in excess of the amount in effect on August 24, 1934, viz, $2 per proof gallon.

We therefore find that the portion of the rum here imported which was withdrawn from warehouse on July 6 and July 14, 1938, is subject to assessment under the Liquor Taxing Act of 1934, at $2 per proof gallon. Judgment will be rendered for the plaintiff accordingly.

U. S. GOVERNMENT PRINTING OFFICE: 1943